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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1996

◆

LAWRENCE NORTON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

◆

On Petition for Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals erred in criminalizing commercial transactions approved by Illinois statutory and case law, and thus nullifying the federal-state balance? Is this decision in conflict with the decision of this Court in *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938)?

2. Whether the Seventh Circuit Court of Appeals erred by ruling contrary to the decision of this Court in *Williams v. United States*, 458 U.S. 279 (1982), that overdrafts by a bank customer on his own account constitutes bank fraud?

3. Whether the Seventh Circuit Court of Appeals erred by ruling contrary to the holdings of this Court has created and defined a crime without statutory authority; namely, overdrafting? *United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812); *Todd v. United States*, 158 U.S. 278 (1895); *Krulewitch v. United States*, 336 U.S. 440 (1949); and *Keeble v. United States*, 412 U.S. 205 (1973).

4. Did the Seventh Circuit Court of Appeals err in failing to follow the holdings of this Court that criminalization of previously lawful conduct by a statute carrying severe penalties requires that the prosecution prove *mens rea* as to the defendant in order to sustain a conviction of that defendant? *Morissette v. United States*, 342 U.S. 246 (1952); *Liparota v. United States*, 471 U.S. 419 (1985); *Staples v. United States*, 511 U.S. 600 (1994).

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OPINIONS BELOW

The District Court opinion denying Petitioner's motion to dismiss the indictment was rendered on December 5, 1995 and is reported as *United States v. Norton*, 909 F.Supp 567 (N.D.Ill. 1995). This opinion is included in the Appendix to this petition. (See A.6a). On January 3, 1996 the District Court denied Petitioner's motion for reconsideration in a minute order without opinion.

The United States Court of Appeals for the Seventh Circuit Court affirmed Petitioner's conviction in an opinion rendered on March 3, 1997, reported as *United States v. Norton, 108 F.3d 133 (7th Cir. 1997)*. This is the judgment the Petitioner seeks to review in this Court. The Seventh Circuit's opinion is included in the Appendix to this petition. (See A.1a).

JURISDICTION

The District Court had jurisdiction in the first instance pursuant to Title 18, U.S.C. § 3231 which confers jurisdiction on the district courts of the United States over alleged offenses against the United States.

The jurisdiction of the United States Court of Appeals for the Seventh Circuit was based on 28 U.S.C. § 1291.

Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1344, provides:

"§ 1344. Bank Fraud -

Whoever knowingly executes, or attempts to execute, a scheme or artifice

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

The Illinois statute governing overdrafts, 810 ILCS 5/4-302, is set forth in full in the Appendix.

The Illinois statute governing negotiable instruments, 810 ILCS 5/3-104, is set forth in full in the Appendix.

STATEMENT OF THE CASE

The facts in the case at bar have never been in dispute.

Petitioner, a certified public accountant, who maintained a checking account at the LaSalle National Bank of Chicago, hereinafter the "Bank", deposited checks payable to himself and endorsed by him to his account at the Bank in an automated teller machine. The Bank gave Petitioner credit for these checks which Petitioner drew on. The overdrafts in question existed between December 13, 1993 and March 29, 1994 and consisted of 79 transactions totalling $1,325,250. The Bank chose on or about March 29, 1994 to discontinue honoring Petitioner's overdrafts and made a demand for the overdraft then existing of $34,698, which Petitioner promptly paid.[1] (R. 49-50)

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[1] As used herein, citations to the record are referred to as "(R.x)" and citations to the Appendix attached hereto are referred to as "(A.x)" where in each case "x" is the page number.

The Government lodged a one count indictment against Petitioner on September 28, 1994, which charged him with violating Title 18 U.S.C. § 1344. The statute although titled Bank Fraud deals with "financial institutions" generically, and makes no reference to any governmental insurance or other governmental involvement. (R. 49-50)

The Petitioner moved to dismiss the indictment, contending that as a matter of law the indictment did not charge a crime under either 1344(1) or 1344(2). (R-1-13) The Government conceded in its response that no offense was charged under Section 1344 (2) and that it was proceeding only under Section 1344 (1). (R. 14) The District Court denied the motion to dismiss and further denied a motion for reconsideration.

The case proceeded to trial on March 12, 1996. The Government offered evidence that Petitioner had not applied for nor received any line of credit from the Bank.

The Bank officers testified that they knew that overdrafts provided the Bank with the same recourse as loans by the Bank and that the Bank carries overdrafts on it balance sheet as assets. (R. 16-19-, 24-42, 63) The Petitioner did not testify or offer other evidence. The Court denied Petitioner's motion for a directed finding of not guilty at the end of the Government's case, and when Petitioner rested, the Court denied his motion for a directed finding of not guilty at the close of all the evidence. (R. 113-114)

The Petitioner tendered an instruction which described an overdraft as a loan to the drawer for which the drawer was liable. The Court refused this instruction. The jury returned a verdict of guilty on March 12, 1996. (R. 183-184)

Thereafter the Petitioner's motions for judgment of acquittal, for a new trial and in arrest of judgment were denied on April 1, 1996 except for paragraph 9 of defendant's motion which was withdrawn by leave of court on April 9, 1996. (R. 12)

The Petitioner was given a two point reduction under the sentencing guidelines for acceptance of responsibility and on June 13, 1996 was sentenced by the District Court to one month's confinement, five months of supervised home confinement, four years supervised release and a $50 special assessment. The Petitioner is presently serving this sentence. (R. 13-16)

ARGUMENT

What has been at the heart of the dispute is the federal-state balance, which has not just been set awry in the Seventh Circuit's holding, but has been nullified in favor of the unfettered power of the federal prosecutor and the courts below to nullify controlling state law. The case at bar is also remarkable in that the Seventh Circuit in its opinion neither distinguishes nor discusses Petitioner's citation as to the decisions of this Court, nor the applicable Illinois law.

Until the decision by the District Court and its affirmance by the Seventh Circuit, overdrafts were governed in Illinois by § 4-302 of the Uniform Commercial Code (810 ILCS 5/4-302). When presented with a demand for payment, as is the case in this cause, Section 4-302 requires a payor bank to ascertain whether the drawer's account contains sufficient funds for payment and to serve a timely notice of dishonor if the account does not have sufficient funds by midnight of the day it receives the check, or, alternatively, the bank may choose not to serve the notice and not to dishonor the check, thereby making a loan to its customer. The language of the statute in pertinent part is as follows:

" Section 4-302. Payor's bank responsibility for late return of item.

(a) <u>If an item is presented to and received by a payor bank, the bank is accountable for the amount of</u>:

> (1) a demand item, other than a documentary draft, whether properly payable or not, if the bank, in any case in which it is not also the depository bank, retains the item beyond midnight of the banking day of receipt without settling for it or, whether or not it is also the depository bank, does not pay or return the item or send notice of dishonor until after its midnight deadline." (emphasis added)

The Illinois law on overdrafts is set forth in *Pacenta v. American Savings Bank*, 195 Ill. App. 3d 808, 552 N.E.2d 1276, 1278 (4th Dist. 1990):

> "Thus, the law under the Code is well settled that a payment for an overdraft is, in effect, a loan by the bank to the drawer, its customer, who, by the act of drawing a check against nonexistent funds, promises to repay the loan, a loan for which the drawer is liable."

The *Pacenta* Court teaches further that:

> "We find more persuasive the view that the Code language is very broad in this area, and the Code should be liberally construed. The Code's purpose is to permit and promote continued expansion of commercial practice in that it encourages banks to pay overdrafts by allowing the banks to recover from their makers...." 552 N.E.2d at 1279.

Mitchell Buick & Oldsmobile Sales, Inc. v. McHenry Savings Bank, 235 Ill. App. 3d 978, 982, 601 N.E. 2d 1360 (2nd Dist. 1992), describes the payor bank's creditor status when there is an overdraft in the following language:

> "[A] [p]ayor bank may charge against customer's account any item which is otherwise properly

> payable even though [the] charge creates an overdraft, (Ill.Rev.Stat. 1989, ch. 26, par. 4-401(1)) [now 810 ILCS 5/4-401(1)], but [a] bank is not ordinarily liable to [the] payee of [a] check made by [a] drawer who has no funds on deposit to cover [the] check, even though the bank has previously honored overdrafts." (citation omitted) 601 N.E.2d at 1364.

The *Mitchell* Court also holds that the Uniform Commercial Code controls the contractual relationship between the parties to all transactions involving checks:

> "[I]n addition plaintiff's argument that the terms of the Code should not apply to the contract unless specifically incorporated is patently unreasonable. This nation handles over 50 billion checks annually (Ill. Ann. Stat., c. 26, par. 4-101, Uniform Commercial Code Comment, at 155 (West Supp. 1992)) [now 810 ILCS 5/4-401(1)], and few parties, depositors, endorsers or drawers to these checks actually refer to the Code when handling a check; yet the precise instructions of the Code are followed when the checks are deposited, collected and paid. Plaintiff's own act of endorsing the check resulted in a myriad of consequences which cannot be understood without reference to the commercial paper laws." 601 N.E.2d at 1366

Neither the Government nor the Seventh Circuit cited a single case proscribing this conduct. No citation to statutory authority, case law or banking practice is vouchsafed that proscribes these acts. Quite the reverse. The instruments are well known to the Commercial Code; they are unconditional promises to pay on demand, endorsed to the Bank and enforceable as notes by the Bank (810 ILCS 5/3-104) (A. 10a). If honored, as they were in the case at bar, they become overdrafts.

The United States District Court for the Northern District of Illinois spoke to a bank's responsibility in connection with overdrafts in *First Nat. Bank in Harvey v. Colonial Bank*, 898 F. Supp. 1220 (N.D. Ill. 1995). The District Court, relying on the holding of the Illinois Supreme Court in *Rock Island Auction Sales, Inc. v. Empire Packing Co.*, 32 Ill. 2d 269, 204 N.E. 2d 721, 723 (1965), states at page 1226 of its opinion:

> "The *Rock Island* court reasoned that the special role of the payor bank in the check collection system justifies the imposition of liability regardless of negligence. The midnight deadline requires the payor bank – the bank in the best position to know whether there are funds available to cover the check – to decide whether to pay or return the check...." (emphasis added)

The law of Illinois as it relates to overdrafts is clear and unequivocal. Overdrafts are legislatively and judicially approved transactions in Illinois. The discussions and holdings of the case law are fully consistent with the treatment of overdrafts under accepted accounting principles. The Accountant's Handbook, Carmichael, Lilien and Mellman, John Wiley and Sons, 1991 states at page 11-4:

> "11.6 BANK OVERDRAFTS. Closely related to the presentation of cash in the balance sheet is the presentation of what may be termed the absence of cash - in other words, a bank overdraft. Overdrafts may be of two kinds: (1) an actual *bank* overdraft, resulting from payment by the bank of checks in an amount exceeding the balance available to cover such checks; (2) a *book* overdraft, arising from issuance of checks in an amount in excess of the balance in the account on which drawn, although such checks have not cleared through the bank in amount sufficient to exhaust the account.
>
> Bank overdrafts represent the total of checks honored by the bank without sufficient funds in the account to cover

> them; such an overdraft is the bank's way of temporarily (or normally, as in Europe) loaning funds to its customers. Accordingly bank overdrafts (other than those that arise in connection with a "zero balance" or similar arrangement with a bank) represent short term loans and should be classified as liabilities regardless of whether positive cash balances may exist in other accounts with the same bank."

This Court has spoken on the legality of overdrafting in *Williams v. United States*, 458 U.S. 279, 102 S. Ct. 3088, 73 L. Ed. 2d 767 (1982), and holds:

> "Although petitioner deposited several checks that were not supported by sufficient funds, that course of conduct did not involve the making of a 'false statement,' for a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'. Petitioner's bank checks served only to direct the drawee banks to pay the face amounts to the bearer, while committing petitioner to make good the obligations if the banks dishonored the drafts. Each check did not, in terms, make any representation as to the state of petitioner's bank balance. **** The Code also makes clear, however, that '[a] check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.' (citation omitted) (458 U.S. at 284 and 285)

Although there is no language in § 1344(1) regarding overdrafting, the Seventh Circuit along with the First, Third, Fourth, Sixth and Tenth Circuits have held that § 1344(1) covers "bare check kiting schemes". *United States v. Doherty*, 969 F.2d 425, 429, 430 (7th Cir. 1992). That is, checks drawn on different banks and deposited to cover each other. The *Doherty* Court states on page 428:

> "Five Circuits have expressly addressed this issue and all have ruled that check kiting schemes involving two or more financial institutions fall within the scope of Section 1344(1)." (citations omitted) The *Doherty* Court goes on to observe that three other circuits "have noted their agreement in dicta...."

However, § 1344(1) itself does not speak to kiting as such at all.

The Seventh Circuit itself in construing *Doherty* in *United States v. LeDonne*, 21 F.3d 1418, 1425 (7th Cir. 1994), specifically addresses the legal significance of issuing checks not supported by sufficient funds where there is only a single drawee bank on page 1425:

> "By stating a factual premise that he had obtained money by means of false pretenses, LeDonne claims he was erroneously led to believe that merely drafting insufficient fund checks constitutes a fraudulent representation. We agree that such a belief is clearly wrong." (emphasis added)

LeDonne's guilty plea was affirmed on facts that disclosed not that he had overdrafted on a single account, but rather had kited checks between separate accounts in different cities.

In the case at bar, Petitioner deposited checks in an automated teller machine which, although not a proprietary machine of the Bank, was an instrumentality of the Bank. The check was drawn only on the depository bank itself, and was drawn on the Petitioner's own account. There was no deception practiced on the Bank, no implicit representation that there were funds in any other bank in any other location.

The Bank honored 79 checks over a period of three months and credited the Petitioner's account during this period with $1,325,250 and did not dishonor the checks that Petitioner drew

against the credit granted him by the Bank, and in March of 1994 terminated the credit that had been extended by the Bank to Petitioner and sought payment of the balance then due which Petitioner promptly paid.

The Seventh Circuit, addresses the issue of a customer overdrafting his own account in the following language in *United States v. Lawrence Norton*, (A. 1a-2a) as follows:

> "In a traditional check kiting scheme, a person artificially inflates a checking account balance during the "float" time that passes when a check moves between two or more banks. Check kiting (assuming the victim is a federally insured financial institution) violates the federal bank fraud statute, 18 U.S.C. § 1344. But can one violate the statute when only one account at one bank is used in the scheme? The answer is 'yes.'"

The Court, on A. 2a describes the basis for its opinion as follows:

> "...[H]e realized that by using a non-LaSalle ATM his "deposits" would be credited to his account within 24 hours, but the check wouldn't be presented to LaSalle for payment until a few days later. As a result, his account would reflect an artificially high balance during the intervening "float" period. In order to use the float to obtain cash advances and write checks to third parties, however, Norton had to keep his "kite" in the air. That is, he needed to repeat his original transaction over and over again to avoid detection and prolong his use of the inflated balance. That's exactly what he did, writing 79 checks (totaling over $1.3 million) to himself by March 29, 1995. During that time Norton wrote checks to third parties and withdrew cash by using ATM's when he knew his account truly had no legitimate funds available to honor the checks and withdrawals."

The Court further states at A. 3a:

> "...Norton contended that without a second bank, the first would know the customer's account is overdrawn and would not be tricked into honoring a worthless check. According to Norton, when a bank honors a series of worthless checks from a single account, it is simply extending an overdraft loan. So, Norton was saying, this was a mere civil matter covered by the Uniform Commercial Code; it was nothing to get the feds nipping at his heels." (Emphasis added)

Finally, the Court at A. 3a states:

> "At closing, Norton argued that LaSalle knew his account was overdrawn and had extended him a loan to cover his overdrafts."
>
> "The jury here was free to accept or reject Norton's loan defense...." 108 F.3d 133, 135)

What the Court fails to state is that the trial court refused Petitioner's instruction which cites the Illinois law defining an overdraft as a loan by the bank to its customer.

Both the majority and the dissent in *Williams* addressed conventional check kiting. That is, the depositing of checks drawn on different accounts in different banks, intended to cover each other. In such an instance there is, in fact, a "float". That is, the bank that credits a deposit from another bank and does not know if there are funds on deposit or not in the counterpart bank gives provisional credit on the implicit representation that there are such funds. The counterpart bank does exactly the same thing. Neither bank is on notice as to the customer's account condition in the drawee bank.

In the case at bar there is but one bank, which kept a continuous record of the account condition of the Petitioner. The

checks in question are drawn by the Petitioner, to himself, endorsed to the Bank for credit to his account and deposited to his account at an instrumentality of the Bank. The Illinois Uniform Commercial Code describes the consequences of such a deposit. The Court below argues that because the deposit was credited to the account within 24 hours but would not be presented to the Bank until a few days later, the account would reflect an artificially high balance during the float period. But the description of the actual transaction contradicts that analysis. Whether the check were deposited by mail, by an automated teller machine or in person, in the course of negotiating a check the Bank must present the check for payment. In the case at bar there was no other bank to which to present the check. There was only the Bank that had granted the credit itself, which under the Uniform Commercial Code it was at liberty to do. The few days for presentment that are of such importance to the Court below do not change the fact that the check must be presented; the records of the bank established that when the checks were presented by itself to itself a few days later Petitioner's account lacked funds to cover the check and extended credit to the drawer. The 79 transactions in question did not involve a few days, but a period in excess of three months.

Section 4-302 (A. 9a) contemplates and governs the transaction where, as in the case at bar, the payor bank is also the depository bank. In the language of the statute, the payor bank is responsible for any item "...whether or not it is also the depositary bank, [if it] does not pay or return the item or send notice of dishonor until after its midnight deadline" (emphasis added) (810 ILCS 5/4302). In the case at bar, the Bank, by not returning the item or dishonoring it, became accountable to the depositor for the deposit, who is then lawfully at liberty to draw on it without reference to whether or not there are collected funds to support the deposit. "The existing laws, statutes, and ordinances become implied terms of the contract as a matter of law." *McMahon v. Chicago Mercantile Exchange*, 221 Ill. App. 3d 935, 582 N.E.2d 1313, 1319 (1991). The Court below has not held nor has the Government disputed that the transactions at issue are loans

between the Bank and the Petitioner that are governed by §4-302 of the Illinois Commercial Code.

The government in its papers neither discusses nor distinguishes the Illinois law but simply says on page 16 of its brief, "The defendant's reliance on Illinois civil law is totally unavailing." The Court below makes no reference at all to the Illinois law nor to the decisions of this Court. The Government in its brief lists a series of inapposite cases where there is bare check kiting involving two banks: *Doherty* and *LeDonne*, previously discussed, and *United States v. Vavlitis*, 9 F.3d 206 (1st Cir. 1993) (where the kite is described as a "float"); or acts that fall well within known definitions of criminal misconduct: *United States v. Brown*, 984 F.Supp. 1150 (N.D. Ill. 1995) (depositing stolen and forged checks and drawing against those checks); *United States v. Strickland*, 935 F.2d 822 (7th Cir. 1991) (use of false identities to order wire transfers to forged foreign bank accounts); *United States v. Mason*, 902 F.2d 1434 (9th Cir. 1990) (credit card slips are altered by adding false vendor's name and depositing false slips in merchant's account); *United States v. Ragosta*, 970 F.2d 1085 (2nd Cir. 1992) (involves a specific written undertaking by the bank's customer never to withdraw more than $300 within any 24 hour period from any automated teller machine, and where the customer withdrew $9,220 in 34 transactions within a 24 hour period); *United States v. Bonallo*, 858 F.2d 1427 (9th Cir. 1988) (computer company employee gains access to ATM records, withdraws cash and alters computer records to conceal his crime).

In setting at naught the federal-state balance and nullifying Section 4-302 of the Illinois Uniform Commercial Code, the Seventh Circuit as well as the District Court rely on the Seventh Circuit's decision in *United States v. Hammen*, 977, F.2d 379 (7th Cir. 1992) at page 383:

> "As stated above, § 1344 is to be construed broadly. Whether a scheme to defraud exists is determined by examining 'whether the scheme demonstrated a

> departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community. The bank fraud statute condemns schemes designed to deceive in order to obtain something of value.'" *United States v. Goldblatt*, 813 F.2d 619, 624 (3rd Cir. 1987).

However, despite the expansive language in *Hammen*, the *Hammen* court describes Hammen's actual conduct on pages 383 and 384 as follows: "He approved loans without meeting applicants, approved loans on information he knew to be false, and approved one loan that had not even been applied for by the nominee."

In *United States v. Goldblatt*, 813 F.2d 619 (3rd Cir. 1987), the case relied on by the *Hammen* court, the court describes the defendant's conduct at page 624 as follows:

> "... appellant knowingly concealed the fact that the man in the photographs was his son. The failure to identify was a concealment of a material fact. *United States v. Martino*, 648 F.2d 367, 393 (5th Cir. 1981). The misrepresentations went to the heart of the refund transaction. As a result of appellant's deliberate false misstatement, his account was recredited and he was able to withdraw money."

The holding by the Court below in the case at bar nullifies not only the Illinois law pertaining to overdrafts, but goes beyond Illinois into the states comprising the Seventh Circuit, and is influential advisory authority for all of the other circuits.

However, this Court in *McNally v. United States*, 483 U.S. 350 (1987) teaches at 358 and 359:

> "[1] As the Court long ago stated, however, the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and

'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.' *Hamerschmidt v. United States*, 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924). The codification of the holding in Durland in 1909 does not indicate that Congress was departing from this common understanding. As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.

"[2] We believe that Congress' intent in passing the mail fraud statute was to prevent the use of the mails in furtherance of such schemes. The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222, 73 S.Ct. 227, 229-230, 97 L.Ed. 260 (1952). See also *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1060, 28 L.Ed.2d 492 (1971). As the Court said in a mail fraud case years ago: 'There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.' *Fasulo v United States*, 272 U.S. 620, 629, 47 S.Ct. 200, 202, 71 L.Ed. 443 (1926). Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has. (Footnote omitted) (Emphasis added)

There is a fully developed Illinois statutory and case law governing overdrafts.

The proposition that the laws of the state are "totally unavailing" and the total disregard of state law by the courts below, contradict the holding of this Court in *Erie R. Co. v. Tomkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), this Court held:

> "...Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of tort. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401, 13 S.Ct. 914, 927, 37 L.Ed. 772 against ignoring the Ohio common law of fellow-servant liability: 'I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and

preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.'

"The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. (footnote omitted) The doctrine rests on the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law'.

"But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * *

"The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.

"Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us

> hesitate to correct.' In disapproving that doctrine we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states."

304 U.S. at 79-80.

The Court below, in holding that conventional overdrafting involving only a depositor overdrafting his own account is a federal felony, has not only created a new common law federal crime, but has, contrary to this Court's decision in *Erie*, repealed the statutory commercial law of Illinois and has reversed the Illinois decisions interpreting that statute.

For its authority, the court below relies on the broad language contained in *Hammen* that establishes the standard as:

> "Whether a scheme to defraud exists is determined by examining 'whether the scheme demonstrated a departure from fundamental honesty, moral uprightness or fair play and candid dealings in the general life of the community.'" *Hammen*, 977 F.2d at 383.

The standard thus established calls upon the courts to define from their own perspectives the proscribed departures. Under this standard a person who owes a debt to a federally insured bank, or under the statute any financial institution, and who possessing the means to repay a debt fails to do so has, it would appear, departed from the *Hammen* standard and has committed a federal felony. The teaching of *McNally*, like the Illinois Commercial Code, is "unavailing."

The *Hammen* standard presumably is likewise violated if a debtor breached his obligation to keep collateral insured. It would also criminalize a deliberate violation of a covenant by a debtor to

maintain his total assets and liabilities in a certain ratio. A debtor's wilful failure to abide by his covenant to maintain compensating balances, or violations of his covenant not to place second liens are now also presumably felonies.

The expansive language of *Hammen* would also appear to encompass employees, as well as customers of banks. For example an executive who signed an employment contract and received a signing bonus and thereafter, without fulfilling the contract or returning the bonus, deliberately and solely for his own benefit left his employment would be subject to § 1344(1). An employee who has received consideration and entered into a covenant not to compete and thereafter enters into direct competition with his former employer has now also become a putative felon. All of these departures have been addressed as civil causes of action for a very long time, but until now have not been transformed into felonies or into any other criminal offenses.

Until the case at bar, decisions affirming convictions under § 1344(1) for check kiting have been limited to the traditional transactions between two banks. It is also the case that until now the factual predicate for prosecution of other offenses under § 1344 has been the existence of conventional criminal conduct. As was the case in *Hammen* itself where the defendant knowingly approved fraudulent loans, including a loan the borrower had never applied for, there was clearly identifiable criminal conduct.

Neither the government nor the Seventh Circuit attempt to distinguish or even discuss the Illinois law that not only permits, but approves and encourages overdrafting. They simply contend that, in fact, Petitioner intended to overdraft and, in fact, did overdraft. The government and the Seventh Circuit , in substance confine themselves to a repetition of the facts that were alleged in the indictment and were not disputed at trial. However, petitioner submits, they do not, and in fact cannot, find statutory authority, precedent in the case law or commercial practices to support their conclusion that those facts constitute criminal conduct. They cling as they must to the dicta in *Hammen*.

Hammen and its precedent *Goldblatt* bluntly set a new common law standard.

This Court decided the common law powers of the courts of the United States in criminal cases in *United States v. Hudson and Goodwin*, 11 U.S. 32, 3 L.Ed 259; 7 Cranch 32 (1812), as follows:

> "The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those Courts by statute." *Hudson* at 32.

The *Hudson* Court, holds that the federal courts do not have common law jurisdiction in criminal cases in the following language:

> "...it would not follow that the Courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *Hudson* at 34.

Each time Petitioner wrote a check payable to himself, he promised to pay the lawful holder of the check the amount of money represented on the check. This promise constituted a note. Illinois law defines a note as a document signed by the maker, containing an unconditional promise to pay a sum certain in money, payable upon demand or at a definite time, and payable to order or bearer. (A. 10a). By endorsing these promises over to the Bank, Petitioner offered to negotiate the ownership of the notes to the Bank to accept or reject as it saw fit.

And the Bank did accept Petitioner's notes until March, 1994, in full possession of the information that the notes were payable from the same account on which they were written. In fact, each time Petitioner deposited an instrument, the Bank records disclosed who the maker of the instrument was, who the payee was, the endorsement, and the funds available to pay the instrument. The Bank had notice of Petitioner's promises to pay to the Bank the consideration given to him by the Bank when it accepted the notes endorsed to it, and credited his account.

The Bank had absolutely no obligation to honor Petitioner's promises to pay. As the Seventh Circuit noted, "a bank is not contractually obligated to honor a check until it accepts it." *United States v. Kucik*, 844 F.2d 493, 496 (7th Cir. 1988) (citing U.C.C. § 3-409). The Bank did accept and honor each of these instruments. The Bank was not mislead in any way. The Bank had all the facts it needed that any bank has in making its determination to credit or dishonor Petitioner's instruments. The Bank had the rights conferred upon it by § 4-214 of the Code, giving it the option to charge the Petitioner's account for any overdrafts it had honored. 810 ILCS 5/4-214. And in the event the Bank did charge Petitioner's account back and Petitioner in conformity with his undertaking as the maker and endorser of the instruments made full payment of that which he owed.

As the Seventh Circuit itself has said, "fraud" under § 1344(1) means "deceit, trickery, or breach of confidence, used to gain some unfair or dishonest disadvantage." *Doherty*, 969 F.2d at 428. The pivotal difference between *Doherty* and *Hammen* is that *Doherty* sets forth proscribed conduct that has long been condemned by statute and clearly defined case law; and *Hammen* condemns conduct relating to a bank or financial institution that "demonstrates a departure from fundamental honest, moral uprightness, or fair play and candid dealings in the general life of the community." *Hammen*, 977 F.2d at 383. Doherty in substance, conforms to the teachings of this Court defining fraud and is consistent with *McNally*. *Hammen*, in dicta, which is relied

on by the *Norton* Court as controlling precedent has created a new and still to be defined category of crimes.

Consistent with this expansive reading of *Hammen* the trial court refused defendant's proposed Instruction No. 12 which quotes Illinois' settled law directly from *Pacenta*, 552 N.E.2d at 1278: "A payment for an overdraft is, in effect, a loan by the bank to the drawer of the check—the bank's customer—who, by the act of drawing a check against nonexistent funds, promises to repay the loan, a loan for which the drawer is liable." By refusing this instruction the District Court determined that, even though Illinois law permitted the transactions in question, Illinois' legislative and judicial authority could not be relied upon by its citizens who engaged in such transactions when those transactions became the subject of federal criminal prosecution. The Seventh Circuit affirmed the District Court's opinion and cited it with approval.

Since neither the Government nor the courts below chose to respond to the Illinois law on overdrafting, it necessarily follows that the Illinois law that existed prior to the decisions of the courts below in the case at bar are of no moment; and that, which heretofore was the lawful practice of overdrafting, is now subject to felony prosecution and harsh punishment. This, without any notice that what prior to the instant prosecution had been a lawful commercial practice is now a major offense against the national sovereign. Again, the law is to the contrary. This Court in *Liparota v. United States*, 471 U.S. 419, 105 S. Ct. 2084 (1985), adopting and quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952), states the rule as follows:

> "'The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil'." *Morissette v. United States*, *supra*, at 250. Thus, in

> *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978), we noted that '[certainly] far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement' and that criminal offenses requiring no mens rea have a 'generally disfavored status.' Similarly, in this case, the failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law.
>
> "This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." (471 U.S. at 425)

This Court speaks further to the issue of the criminalization of otherwise lawful conduct in *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed. 2d 608 (1994), as follows:

> "Here, there can be little doubt that, as in *Liparota*, the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state–ignorance of the characteristics of weapons in their possession–makes their actions entirely innocent." (footnote omitted) 114 S.Ct. at 1802.

The Court continues at pages 1802 and 1803 to state:

> "We concur in the Fifth Circuit's conclusion on this point: 'It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment if...what they genuinely and reasonably believed was a conventional semiautomatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon.' *Anderson, supra* at 1254 [885 F.2d 1248 (5th Cir. 1989) (en banc)]. As we noted in *Morissette*, the

'purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction.' 342 U.S., at 263, 72 S.Ct., at 249. (footnote omitted) We are reluctant to impute that purpose to Congress where, as here, it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation in the form of a statute such as Sec. 5861(d).

"The potentially harsh penalty attached to violation of § 5861(d)--up to 10 years' imprisonment--confirms our reading of the Act. Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*. Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary. See, *e.g.*, *Commonwealth v. Raymond*, 97 Mass. 567 (1867) (fine of up to $200 or six months in jail, or both); *Commonwealth v. Farren*, 91 Mass. 489 (1864) (fine); *People v. Snowberger*, 113 Mich. 86, 71 N.W. 497 (1897) (fine of up to $500 or incarceration in county jail)." (footnote omitted)

In the case at bar 18 U.S.C. § 1344 provides for a sentence of up to 30 years in prison and a fine of up to $1,000,000.

The Seventh Circuit itself in *United States v. Edwards*, 90 F. 3d 199 (7th Cir. 1996), applies *Staples* and states at page 201 and 202:

"In light of the commonplace, innocent ownership of many guns, the Court was unwilling to dispense with the *mens rea* requirement that the defendant know of the particular characteristics that subjected his weapon to regulation. The Court was clearly concerned that

> without such a knowledge element, § 5861(d) would criminalize a broad range of apparently innocent conduct." (citation omitted)

Williams holds that overdrafting between separate accounts in separate banks is not unlawful. Congress purportedly responded with § 1344(1) criminalizing such conduct, but no enactment has criminalized overdrafting in one account by one customer in one bank. In reading § 1349(1), despite the holdings of the courts below, the text is barren of any references to kiting of any kind, but in particular is there no suggestion that heretofore lawful overdrafting is now a criminal offense. *Liparota, Staples*, and *Edwards* cited above deal with the criminalization of that which could be perceived by the prospective defendant as lawful conduct, and put the Government to the burden of proving that the defendant knew that the conduct was proscribed. In the case at bar, the conduct at issue, overdrafting by a customer on his own account in the depository bank, has not been proscribed by either state or federal law.

The record is devoid of evidence that the Petitioner had any reason to believe that overdrafting had become a criminal violation, and it is fair to say that the statute does not even intimate that this is so. Thus the Petitioner and all other bank customers, proceed at their grave peril if they overdraft in conformity with what were heretofore the lawful standards of the Uniform Commercial Code, the cases interpreting the Code, and generally accepted accounting principles.

This statement by this Court in *Williams*, it is submitted, is apposite:

> "Given this background–a statute that is not unambiguous in its terms and that if applied here would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by state law–

> we believe that a narrow interpretation of § 1014 would be consistent with our usual approach to the construction of criminal statutes. The Court has emphasized that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" (citations and footnote omitted) (458 U.S. at 290)

CONCLUSION

For the reasons stated herein, Petitioner prays that his petition for a Writ of Certiorari be granted.

Respectfully,

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